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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. [redacted] 21

ESSEX RAZOR BLADE CORPORATION
Petitioner

vs.

GILLETTE SAFETY RAZOR COMPANY
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GEORGE E. MIDDLETON
CHARLES W. RILEY
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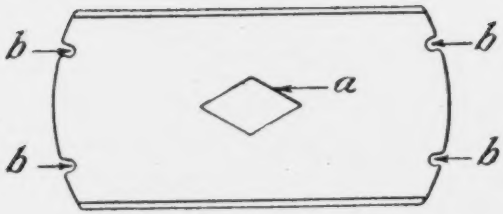
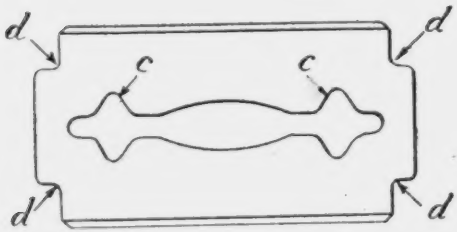
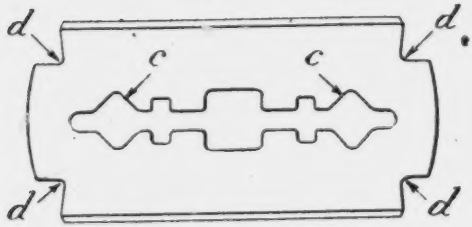
Counsel for Petitioner



THE GAISMAN BLADE of the patent in suit.



PETITIONER'S BLADE which the Court of Appeals for the Third Circuit held to be an infringement.



THE CLARK (OR HAWLEY) BLADE which the Court of Appeals for the Second Circuit held NOT to be an infringement.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

ESSEX RAZOR BLADE CORPORATION
Petitioner

vs.

GILLETTE SAFETY RAZOR COMPANY
Respondent

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

YOUR petitioner, Essex Razor Blade Corporation, prays for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit to review the decree of that Court in this cause filed March 5, 1936 (Rec., p. 245).

A certified transcript of the record in the case, including the proceedings in the Circuit Court of Appeals, is furnished herewith in compliance with Rule 38 of the Rules of this Court.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a suit in equity brought by respondent to recover damages for past infringement and to enjoin further infringement of claims 1 and 2 of Gaisman patent No. 1,633,739 (Rec., p. 120). The subject matter of these claims is a safety razor *blade*. The patent contains other claims directed to a safety razor assembly, that is to say, the complete razor consisting of the combination of guard, clamping member or cap, and blade; but infringement of those claims is not charged. The only issues involved are whether the blade alone is patentable independently of the combination and, if so, whether the blade made and sold by the petitioner constitutes an infringement.

The blade of the patent is a flexible, double-edge blade of the Gillette type, a type in common use since 1904 when Gillette's original patent was issued (Rec., p. 138). It is shown in Figure 7 of the patent in suit, here reproduced:

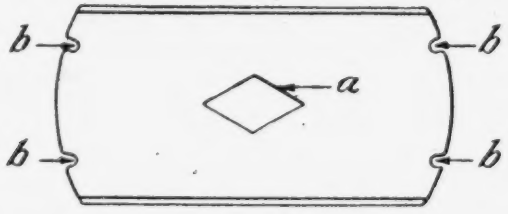

Fig. A. The Gaisman Blade of the Patent in Suit.

This blade, as defined in claims 1 and 2, is characterized by a non-circular or angularly-shaped central opening *a* (designed to retain the blade in shaving relation to the guard), and end notches *b* (designed to cooperate with the clamping member to retain the latter, independently of the guard, in shaving relation to the blade). Claim 1 reads as follows:

> "1. A blade having a non-circular opening substantially centrally disposed to retain the blade in shaving

relation to a guard member, said blade having means spaced from said opening to cooperate with a clamping member to retain the latter in shaving relation to the blade independent of the guard member."

Claim 2 is substantially the same except that the central opening is said to be "angular"—the preferred form.

The blade made and sold by petitioner (Pltf.'s Exhs. 4 and 5) is here illustrated:

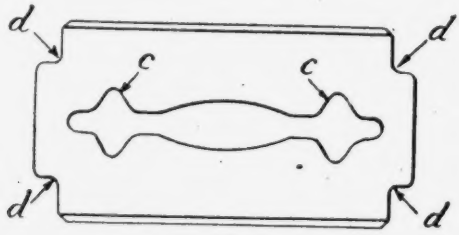

Fig. B. Petitioner's Blade.

This blade is characterized by a long, irregularly-shaped, longitudinal slot, having two non-circular enlargements or openings *c*, one near each end, and corner notches *d*. It is notched and slotted in this fashion in order that it may fit the various Gillette-type razors in common use today, including the so-called "Goodwill" razor (Pltf.'s Exh. 9). Petitioner's blade differs from the blade defined by the claims in suit in having two non-circular enlargements or openings at each end of a long slot instead of a single diamond-shaped opening in the center of the blade, and in having notches at its corners instead of in its ends. The issue of infringement thus turns upon whether claims 1 and 2 of the patent in suit are of such scope as to include a blade which differs from the patented blade in these particulars.

The District Court held the claims in suit invalid for lack of invention saying:

> "I think that the improvement of the blade disclosed by the Gaisman patent is not inventive" (Rec., p. 96),

and entered a decree dismissing the bill (Rec., p. 18). The issue of infringement was not passed upon by the District Court.

On appeal, the Court of Appeals for the Third Circuit reversed the District Court, held the claims valid, and, although expressly recognizing the above noted differences between petitioner's blade and the blade defined by the claims of the patent (Rec., p. 243), nevertheless found infringement.

This same Gaisman patent was before the Circuit Court of Appeals for the Second Circuit in *Gillette Safety Razor Company* v. *Hawley Hardware Company*, 64 F. (2d) 10 (appendix, p. i). In that suit respondent charged that the Hawley Hardware Company infringed claims 1 and 3 of the Gaisman patent by selling a blade manufactured by Clark Blade and Razor Company and here illustrated:

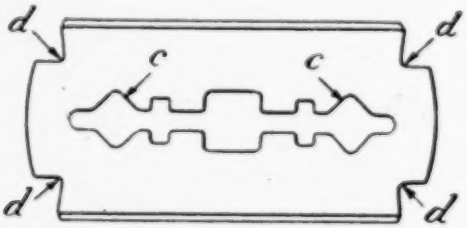

Fig. C. The Clark (or Hawley) Blade.

This blade, like petitioner's blade, is characterized by an irregularly-shaped, longitudinal slot having two non-circular openings or enlargements *c* and corner notches *d*. And like petitioner's blade it is thus notched and slotted to fit various razors, including the Goodwill.

The Court of Appeals for the Second Circuit, in the *Hawley* case held that the Clark blade did *not* infringe the Gaisman patent, stating in its opinion (appendix, p. iv):

> "The appellant's blade [Fig. C] does not infringe the construction or perform the functions specified in claim 1, * * *."

The Court, holding claim 1 not infringed, had no need to pass on the issue of validity.

REASON FOR GRANTING THE WRIT.

The discretionary power of this Court to grant a writ of certiorari is invoked upon the following ground:

In holding that claims 1 and 2 of the patent in suit are of such scope as to be infringed by the blade made and sold by petitioner, the Circuit Court of Appeals for the Third Circuit has rendered a decision in conflict with a decision of the Circuit Court of Appeals for the Second Circuit on the same matter. Except for minor differences in the mid-portions of their slots—differences in ornamentation only, without functional significance and not claimed—petitioner's blade (Fig. B) and the Clark blade (Fig. C) considered by the Court of Appeals for the Second Circuit in the *Hawley* case, are the same. Thus as matters stand, a blade that can be freely made and sold in the Second Circuit is an infringement in the Third, and its manufacture and sale there enjoined.

The doubt and confusion which must inevitably ensue because of this conflict can be resolved only by this Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Third Circuit, to the end that

this cause may be reviewed and determined by this Court; that the decree of the Circuit Court of Appeals for the Third Circuit be reversed; and that petitioner be granted such other and further relief as may be proper.

ESSEX RAZOR BLADE CORPORATION,

By GEORGE E. MIDDLETON,
CHARLES W. RILEY,
C. W. PALMER,
Counsel for Petitioner.

New York City,
March, 1936.

BRIEF IN SUPPORT OF PETITON FOR WRIT OF CERTIORARI.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court for the District of New Jersey, written by Judge Clark, has not been separately reported, but is printed in full as a footnote to the opinion of the Court of Appeals. The opinion of the Court of Appeals for the Third Circuit (Circuit Judges Buffington, Davis and Thompson), written by Judge Buffington, was filed on March 5, 1936 and appears at page 230 of the record. It is reported in 28 U. S. Pat. Q. 419.

JURISDICTION.

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the act of February 13, 1925, c. 229 (28 U. S. Code, Sec. 347).

The decree of the Circuit Court of Appeals for the Third Circuit which petitioner seeks to have reviewed was entered March 5, 1936 (Rec., p. 245).

STATEMENT OF CASE.

The essential facts of the case are stated in the accompanying petition for a writ of certiorari and need not be repeated here.

SPECIFICATION OF ERRORS.

If the writ of certiorari is issued, petitioner intends to urge that the Circuit Court of Appeals erred:

1. In holding claims 1 and 2 of the patent in suit of such scope as to be infringed by petitioner's blade.

2. In holding claims 1 and 2 of the patent in suit valid.

3. In reversing the decree of the District Court dismissing the bill of complaint for want of equity.

ARGUMENT.

IN HOLDING THAT CLAIMS 1 AND 2 OF THE PATENT IN SUIT ARE OF SUCH SCOPE AS TO BE INFRINGED BY THE BLADE MADE AND SOLD BY PETITIONER, THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH A DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT ON THE SAME MATTER.

Judge Buffington, writing the opinion of his Court, referred to the *Hawley* case in a footnote (Rec., p. 241), quoting, oddly enough, from the opinion of District Judge Thomas whose decree was reversed. Of the proceedings in the Court of Appeals he noted merely that the reversal had been on the ground of non-infringement, but as the accused blade before that Court was to all intents and purposes the blade before *him*, the decisions of the two Courts of Appeal are in clear conflict on the vital issue of the scope of Gaisman's claims.

On the essential identity of the blades involved in the two suits, respondent itself is committed. In the *Hawley* case, the present respondent petitioned this Court for a writ of certiorari (denied October 9, 1933, 290 U. S. 649). We have reproduced and have appended hereto that petition and its supporting brief, from which it appears that the Gillette Company at that time considered the Clark blade of the *Hawley* suit no different in any essential respect from the blade made and sold by the present peti-

tioner. On pages 13 and 15 of its brief, the present respondent illustrated the Clark (or Hawley) blade in conjunction with the guard and cap of a Goodwill razor, explaining how the blade was adapted to be used in that razor. Similar drawings, illustrating *petitioner's* blade in conjunction with the same razor were used by respondent in this suit and reproduced by the Court of Appeals in its opinion (Rec., p. 241A). On pages 11, 13 and 15 of its brief filed before this Court in the *Hawley* case the present respondent said:

> "Defendant's blade [our Fig. C] has two diamond-shaped openings which are spaced equidistantly from the center instead of a single diamond-shaped opening. The two openings fit the two lugs on the guard just as Gaisman's single opening fits the single lug on his guard. Defendant's blade also has four corner notches which fit the corner lugs on the cap, so that the cap is positioned on the guard by the blade, exactly as in the patent in suit, the only difference being that the notches are at the corners of the blade instead of in the curved ends. The only differences over the patent in suit are, (1) the provision of two diamond-shaped holes in the blade and two lugs on the guard instead of one, (2) the slight change of location of these elements made necessary only because of their duplication, and (3) the slight change in position of the notches in the blade and of the interfitting corner lugs on the cap. These changes produced no difference in function or mode of operation. *Defendant's blade is the sole element which positions the cap with respect to the guard.* The changes, therefore, do not avoid infringement. The form is slightly different but the substance of the invention has been appropriated. * * *
>
> "Defendant's blade (see right-hand sketch below) [our Fig. C] has two (instead of one) diamond-shaped openings which are spaced equidistantly from the

center and are connected by a slot *and a non-functional square enlargement big enough so that the screw stud on the cap* will not interfere with the blade. (Italics ours.) * * *

"In defendant's blade the notches are placed at the corners of the blade because the projections on the cap of plaintiff's razor are located at its corners instead of at the ends (see sketch below) [our Fig. C]. They are 'spaced apart from' the central opening in the same way as the notches in the Gaisman blade are spaced apart from the central opening of that blade."

This language is as applicable to petitioner's blade as to the Clark (or Hawley) blade to which it was addressed. Indeed respondent, as quoted by the Court of Appeals in its opinion (Rec., p. 243), used substantially the same language in this suit to describe petitioner's blade.

There can be no doubt that petitioner's blade and the Clark blade are the same blade, and have been so considered by respondent itself. Both blades will fit plaintiff's Goodwill razor (Pltf.'s Exh. No. 9), and if precision is the great desideratum, as declared by Judge Buffington—the blade exposure must be set within a "hair's breadth" he said (Rec., p. 238)—then the Clark blade is a better infringement than petitioner's because it fits the Goodwill razor with greater accuracy—although neither blade fits "snugly" as specified by Gaisman. If the claims in suit are infringed by petitioner's blade they are certainly infringed by the Clark blade. The conflict is, therefore, clear and unmistakable.

The Canadian patent corresponding to the patent in suit has been litigated in Canada. In *Gillette Safety Razor Company of Canada, Limited,* v. *Pal Blade Corporation, Limited, et al.* [1933], S. C. R. 142 (appendix, p. v), the Supreme Court of Canada had before it claims 4 and 5 of this Canadian patent, which are claims 1 and 2 of the

United States patent *verbatim*. The blade charged to infringe these claims was described by the Court in the following language (appendix, p. xvii):

> "The blade manufactured and sold by the respondent differs from that disclosed in the patent in that, instead of a diamond shaped opening disposed in the center latitudinally and longitudinally of the blade, it has a long irregularly shaped slot extending for most of its length, and that instead of the notches in the ends, the four corners are perforated with rectangular openings."

The Supreme Court of Canada concluded (appendix, p. xviii):

> "The respondent's blade does not correspond to the blade described in the specification and in the drawings. There was no infringement. Of course, the appellant urges the respondent's blade is substantially similar to the blade used in the Goodwill type of razors. The answer is that the Goodwill blade is not the article disclosed in the patent."

Thus the Supreme Court of Canada was in agreement with the Court of Appeals for the Second Circuit with respect to the scope to be given the blade claims of the Gaisman patent. The Court of Appeals for the Third Circuit did not refer to this concurrence of views, although expressly mentioning the Canadian decision, "lest it should appear we have overlooked it" (Rec., p. 245).

This Court has issued writs of certiorari in numerous patent cases where the conflict of decision turned on the scope of the patents in suit. Among the more recent of these, *Smith* v. *Snow*, 294 U. S. 1, and the companion case, *Waxham* v. *Smith*, 294 U. S. 20, may be noted.

CONCLUSION.

Unless this Court, by the exercise of its discretionary power, shall determine, once and for all, the scope of this Gaisman patent, manufacturers of notched and slotted razor blades who haply reside in the Second Circuit will enjoy an immunity from suit not vouchsafed those less fortunate manufacturers of similar blades who reside in New Jersey, Pennsylvania or Delaware. This anomalous situation, affecting as it does the interests of a large industry, should not be permitted to continue. We earnestly urge, therefore, that a writ of certiorari be issued, as prayed for.

Respectfully submitted,

GEORGE E. MIDDLETON,
CHARLES W. RILEY,
C. M. PALMER,
Counsel for Petitioner.

New York City,
March, 1936.

APPENDIX.

OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT.

GILLETTE SAFETY RAZOR COMPANY,
Plaintiff-Appellee,

against

HAWLEY HARDWARE COMPANY,
Defendant-Appellant.

(Reported 64 F. [2d] 10.)

Before:

MANTON, AUGUSTUS N. HAND and CHASE,
Circuit Judges.

Appeal from the District Court for the District of Connecticut. Suit for infringement of patents Nos. 1,633,739 and 1,815,745. Decree for plaintiff; defendant appeals. Reversed.

MANTON, Circuit Judge.

This suit involves a charge of infringement of the Gaisman patent No. 1,633,739, claims 1 and 3, and the Thompson patent No. 1,815,745. The infringement consists of selling razor blades manufactured by the Clark Blade & Razor Co. of Newark, N. J. and sold by the defendant in the District of Connecticut. No charge is made that the appellant or the Clark Blade & Razor Co. manufactured or sold safety razors; their sales were blades adapted for use in the Gillette razors, and this is the only act of infringement to be considered.

Claim 1 of the Gaisman patent reads:

"A blade having a non-circular opening substantially centrally disposed to retain the blade in shaving relation to a guard member, said blade having means spaced from said opening to co-operate with a clamping member to retain the latter in shaving relation to the blade independent of the guard member."

And Claim 3 reads:

"A safety razor comprising blade clamping members, a blade, means cooperative between one of said members and said blade to retain the latter in shaving relation to said member, said blade and the other member having cooperative means whereby the blade will retain said member in an operative position respecting the blade, and means to detachably clamp the blade between said members."

Direct infringement of claim 1 and contributory infringement of claim 3 and of claims 1, 2, 4, 5, 7 and 8 of the Thompson patent are charged.

Claim 1 of the Gaisman patent purports to cover a razor blade *per se*. The other claims do not. Appellant's position is that its razor blades do not embody the alleged invention of claim 1, and that, if it covered appellant's blades, it is anticipated by the prior art. With respect to claim 3 of the Gaisman patent and the claims sued on in the Thompson patent, appellant's contention is that there can be no contributory infringement.

As to Claim 1 of the Gaisman patent, the infringing act is the sale of three packages of razor blades. It was apparent upon a mere examination that the appellant's blade is not "a blade having a non-circular opening substantially centrally disposed to retain the blade in shaving relation to a guard member." The drawings of this patent as well as the specifications show a diamond shaped opening in the blade designed to fit snugly on the projec-

tion. The functions of the projection and the opening are explained in the specifications. The projection is provided on the blade side of the guard member adapted to enter an opening in the blade. By preference, the patentee says, he makes the blade non-circular in shape, preferably having straight sides, the opening in the drawing being shown in the diamond shape and the projection is of non-circular shape adapted to receive the metal at the sides of the opening so that the blade will be retained by said projection upon the guard member with its cutting edges in shaving relation to the guard teeth when the parts are assembled. In the appellant's blade, although there is a non-circular opening substantially centrally disposed, the opening does not fit snugly upon any projection or stud in the guard or on any other part of the razor frame, and cannot perform the function of positioning the blade with respect to the guard which is performed by the diamond shaped opening in the patentee's blade which fits snugly upon the diamond shaped projection in the razor. There is not a non-circular centrally disposed opening in the appellant's blade retaining the blade in any relation whatsoever to the guard member. Moreover, the matter of obtaining proper shaving relation between the parts of the razor and the blade is not new in the present type of Gillette razor.

The appellant's blade does not embody the structure nor perform the function specified in claim 1 which reads: "Said blade having means spaced from said opening to cooperate with a clamping member to retain the latter in shaving relation to the blade independent of the guard member." Claim 1, referring to the clamping member, calls for a backing member. The contention is that the notches in the Gaisman blade are "the means spaced from said opening to cooperate with the clamping member to retain the latter in shaving relation to the blade independent of the guard members," and that the corner of the appellant's blades are the same as the notches of the appellee's. We

do not think that in the patentee's device the notches do perform the function called for in the second clause of claim 1. The claim may not be altered to change its plain meaning so as to increase or give breadth to it. Keystone Bridge Co. v. Phoenix Iron Co., 95 U. S. 274, 278; U. S. Light & Heat Corp. v. Safety Car Heating & Lighting Co., 261 Fed. 915, 918 (C. C. A. 2).

Claim 3 of this patent, as well as the claims in the Thompson patent, details a combination of claims to the razor as a whole. The appellant is not chargeable with contributory infringement of these claims for the reasons stated in Gillette v. Standard Safety Razor Co. (C. C. A.), 64 F. (2d) 6, decided this day, in our consideration of the same Thompson patent here in suit. The claim of contributory infringement here advanced as to these claims is no different than that which we considered in the Standard Co. Case. The appellant's blade does not infringe the construction or perform the functions specified in claim 1, and claim 3 and the claims of the Thompson patent are not contributorily infringed.

Decree reversed.

OPINION OF THE SUPREME COURT OF CANADA.

GILLETTE SAFETY RAZOR CO. OF CANADA, LIMITED,
(*Plaintiff*) *Appellant*,

v.

PAL BLADE CORPORATION, LIMITED, and METROPOLITAN STORES, LIMITED,
(*Defendants*) *Respondents*.

(Reported [1933] S. C. R. 142.)

(Concurred in by LAMONT, SMITH, CANNON and CROCKETT, JJ.)

RINFRET, J.:

The appellant brought this action against the respondent for the alleged infringement of patent No. 260368. The particulars of breaches were that the respondent manufactured and sold razor blades which constitute an infringement of claims 1, 2, 3, 4 and 5 of the patent.

The defence was: no infringement; and, alternatively, no invention on account of anticipation, lack of novelty and lack of utility.

Before the Exchequer Court, the appellant failed in its action, which was dismissed with costs.

The patent relates to safety razors and the invention is stated to be particularly applicable to the class of safety razors comprising a guard, a backing and a thin flexible blade clamped between the guard and the backing to retain the cutting edge of the blade in shaving position to the guard teeth.

In the class of razors referred to, as, for example, in the widely known razors of the original Gillette type, it has been customary to provide the backing members with pins that project through holes in the blade and into holes in the guard member, whereby the blade and the backing are retained from rotation on the guard by the co-operation of the pins with the guard and by the clamping of the blade between the guard and the backing, so that the blade performs no function in retaining any of the said parts in relation one to another.

The object of the invention defined in the patent is said to provide a safety razor wherein a blade will co-operate with a guard member to retain the blade in shaving relation thereto and the blade will also co-operate with a backing member to retain the latter in proper relation to the blade for shaving purposes, so that the position of the backing member with regard to the guard member is maintained by the blade and not by the co-operation of said members together in the well known manner which used to prevail up till then.

Having so defined the object of the invention, the specification states that the latter comprises novel details of improvement more fully set forth thereafter and to be pointed out in the claims; also: that "reference is to be had to the accompanying drawings forming a part of the patent." The specification then proceeds to describe the razor, and the description refers to the blade as follows:

> "The blade is provided with a substantially centrally disposed opening 2a through which the projection 4 of the backing member may pass when the blade is between the members 1 and 3. Heretofore, so far as I am aware, the opening in the blade for the projection from the backing for clamping the parts together has been circular so that reliance was had upon spaced pins projecting from the backing to pass through spaced holes in the blade and into holes

in the guard member to keep the blade and backing in position on the guard member. In accordance with my invention I provide cooperative means between the blade and the guard member to keep the blade from rotating on said member. For such purpose I provide a projection 1b on the blade side of the guard member adapted to enter an opening 2a in the blade. By preference I make the opening 2a in the blade of non-circular shape, preferably having straight sides, the opening 2a in the drawing being shown in so-called diamond shape, and the projection is of non-circular shape, as shown in so-called diamond shape (fig. 3), adapted snugly to receive the metal at the sides of opening 2a so that the blade will, by said projection, be retained upon guard member I with its cutting edges in shaving relation to the guard teeth when the parts are assembled. Means are provided between the blade and the backing member to cause the blade to retain the backing in operative relation to the blade and the guard, for which purpose I have shown the blade provided with recesses or openings 2b, preferably at its ends, adapted to receive projections or pins 6 extending from the backing member toward the blade, but not to cooperate with the guard member to retain the backing."

The balance of the description relates to the combination of the guard, the backing member and the blade and explains how they should be assembled for purposes of cooperation.

There follows a series of eleven claims, the last six of which have to do with the combination, that is to say: with the complete razor; while the first five claims relate to the blade alone. They are the only claims with which we are concerned in this case and they may now be set out in this place:

"1. A blade having means to cooperate with clamping members located on opposite sides of the blade to retain said members and blade in shaving relation.

"2. A blade having means to position it on a clamping member, and having means to cooperate with another clamping member to retain the latter member in relation to the blade.

"3. A blade provided with means to position itself on a clamping member, and having means independent of the first named means for positioning another clamping member on the blade.

"4. A blade having a non-circular opening substantially centrally disposed to retain the blade in shaving relation to a guard member, said blade having means spaced from said opening to cooperate with a clamping member to retain the latter in shaving relation to the blade independent of the guard member.

"5. A blade having an angularly shaped opening disposed substantially centrally in the blade to cooperate with a guard member to retain the blade in shaving position thereon, and said blade being provided with means spaced from said opening to cooperate with a backing member to retain the latter in shaving relation to the blade and to the guard member."

The plain object of the invention as described in the specification is to substitute to the razor of the old Gillette type a new and improved safety razor wherein the position of the backing member with regard to the guard member is maintained by the blade and not by the co-operation of the backing and guard. The purpose of this was explained in the evidence.

In that class of razors, which have a flexible blade clamped between a guard and a backing, both the outside surface of the guard teeth as well as the upper corner at the edge of the backing member combine as a shield for the blade to prevent it cutting the face when it is in use. "The combined function of the guard and cap makes it a "safety razor, provided the blade does not project too far "beyond a plane which might be considered a tangent to "the guard teeth and corner of the cap (or backing mem- "ber), which plane (in this case) is represented by a man's "cheek when he shaves with a razor. The guard teeth "bear on the cheeks underneath and pull down so as to "depress the cheek somewhat, so that the blade will only "cut the hair and not dig deeply into the cheek."

Obviously the amount of the exposure of the blade along that tangent plane is important and has a great deal to do with the utility of the razor, for: the greater the accuracy of the blade exposure, the greater the shaving efficiency of the razor.

According to the evidence, a long series of blade tests and shaving tests indicate 4/1000ths of an inch is the preferable exposure. But there are difficulties in the way of securing this result. There stands the necessity for clearance, that is: the necessity of providing a "sliding fit" between the holes in the blade and the projections in the holder. And there is also the manufacturing necessity of providing tolerances, or, in other words, of determining, from a commercial and economical point of view in governing the factory, how far the clearances should be allowed to vary from the dimensions essentially required for the "sliding fit." The consequence is that the accuracy of the blade exposure is affected by these clearances and tolerances. It is contended that, through the invention, the variations caused by the cumulative effect of the clearances and tolerances are corrected to a great extent and, thus, the improvement makes surer the approximation to the ideal exposure. This is caused, it is explained,

by the fact that the clearances and tolerances are taken up simultaneously by the respective movements of the several parts of the razor, that is to say: that the movements of the guard and cap,—which are designed to move independently from one another—are controlled by the blade, acting as a link between the two. As a result, you may have the same tolerances or, in other words, the same inaccuracies in manufacture, but they are taken care of and they are corrected to an extent at least sufficient to insure at all time the desired accuracy of the blade exposure. It is in this, the appellant stated, that lies the whole point of the patent.

This result, however, as will be perceived, is brought about—and can only be brought about,—by the co-operation between the blade and the other members of the razor. It is not produced—and cannot be produced—by the blade alone. It is essentially the result of the particular combination of the component parts of the razor.

For the purposes of this case, it may be assumed that there was invention in the combination referred to. If there was, it is protected by the claims of the patent which are not in issue. But the attachment of the blade to the other members of the razor is not involved here. The question we have to consider is whether the blade was patentable independently of the combination and, if so, whether it was adequately claimed and whether the blade manufactured and sold by the respondent constitutes an infringement thereof.

In order to answer that question, we must be guided primarily by the provisions of the 14th section of the Patent Act.

That section requires the specification to be a correct and full statement of what the invention is. The inventor must describe its operation or use as contemplated by him. He must set forth clearly the method of constructing or making the manufacture he has invented. He must end the specification with claims stating distinctly the things

or combinations which he regards as new and in which he claims an exclusive property and privilege. In any case in which the invention admits of illustration by means of drawings, the inventor shall, with his application, send in drawings showing clearly all parts of the invention and each drawing shall have written references corresponding with the specification. One duplicate of the specification and of the drawings, if there are drawings, shall be annexed to the patent, of which it shall form an essential part.

It follows that the nature of the invention protected by a patent and the extent of the monopoly thereby granted must be ascertained from the claims. The claims should be construed with reference to the specification and to the drawings, but, as pointed out by LINDLEY, M. R. in *The Pneumatic Tyre Company, Limited* v. *The Tubeless Pneumatic Tyre and Capon Headon, Limited* (15 R. P. C. 236, at p. 241), whether the patentee has discovered a new thing or whether he has not, his monopoly is confined to what he has claimed as his invention. And, if the proposition requires further support, we would like to quote a passage from the speech of LORD LOREBURN, L. C. (concurred in by LORD HALSBURY, LORD MACNAGHTEN and LORD ATKINSON) in the case of *Ingersoll Sergeant Drill Company* v. *Consolidated Pneumatic Tool Company, Limited* before the House of Lords (25 R. P. C. 61, at p. 83). It is, we think, peculiarly apposite in the circumstances:

> "There can be no dispute about the law. Each claim in a Specification is independent, and a plaintiff in an action for infringement must show that there has been an adoption of some new invention adequately described in a Claim when fairly construed. I am not aware that any special canons of construction are applicable to Specifications, nor am I able to accept, if indeed I rightly understand them, certain formidable generalisations presented to us in argument as to the

principles on which they are to be interpreted. Obviously, the rest of the Specification may be considered in order to assist in comprehending and construing a Claim, but the Claim must state, either by express words or by plain reference, what is the invention for which protection is demanded. The idea of allowing a patentee to use perfectly general language in the Claim, and subsequently to restrict, or expand, or qualify what is therein expressed by borrowing this or that gloss from other parts of the Specification, is wholly inadmissible. I should have thought it was also a wholly original pretension."

The claims alleged to have been infringed are set out in an earlier part of this judgment. They are five in number, but they may be divided into two groups.

The first group, composed of claims 1, 2 and 3, may be at once disposed of. They are clearly anticipated in the prior art and we deem it unnecessary to refer to or even to enumerate the numerous patents shown in the evidence as disclosing blades of the kind described in these claims and blades having means performing similar functions. We fail to see how claims 1, 2 and 3 may be patentably distinguished from the patents set forth in the particulars of objection and discussed in the evidence of Mr. Blosk.— Moreover, each of these Claims are completely met, we think, by one or the other of the original Gillette patents (U. S. Nos. 775134 and 775135), which have expired.

Further, it may be noted that claims 1, 2 and 3 do not appear in the corresponding United States patent. The evidence shows that they were inserted in the original application for that patent, but they were subsequently abandoned and cancelled.

The second group of claims in suit are Nos. 4 and 5. The characteristics of the blade therein described are that the blade must have a non-circular or angularly shaped

opening, substantially centrally disposed, to co-operate with the guard and to retain the blade in shaving position on the guard, as well as in shaving relation to the latter; and the blade is also to be provided with means spaced from said opening to co-operate with the backing member and to *retain the latter,* independently of the guard, in shaving relation to the blade and to the guard.

In dealing with these claims, one must remember that they have reference only to the blade. They have nothing to do with the combination of blade, guard and cap covered by the subsequent claims and which is the true subject-matter of the patent. For the purpose of construing the claims, we must assume that the holder is neglected, and the blade must be envisaged, not as an element of the combination, but as a separate article independent of the other component parts of the razor. And the question must be: Is that blade standing alone as described a good and valid subject-matter of a patent?

In that view and as presented in the specification, the blade would be an appendent or subordinate invention, which the patentee has chosen to claim in addition to the main or principal invention consisting in the complete safety razor.

In such a case, the patentee must describe with particular distinctness the alleged new element for which he asks special protection. He must make plain the metes and bounds of the subsidiary invention and he will be held strictly to the thing in which (to borrow the words of s. 14 of the Act) he has claimed "an exclusive property and privilege." (*Ingersoll* v. *Consolidated Pneumatic,* H. of L. *locot citato,* at p. 84.)

The claims relate to a blade with means to "cooperate" and to "retain." One of the means is stated: it is the centrally disposed opening. The others are referred to merely as "means spaced from said openings." If we look at the rest of the specification and at the drawings, to as-

sist in comprehending what these means are, we find that what the patentee had in view and what he intended to claim were four notches or openings, at the ends of the blade, adapted to receive projections extending from the backing member of the razor. So that, so far as concerns the blade, the means disclosed throughout are nothing but holes, one set of means being the central hole and the other, the holes or openings in the ends.

We would not think the patentee intended to make the broad claim to the monopoly of the right to perforate any and all shapes of holes in a razor blade of the type in question. That alone would be quite sufficient to invalidate the claim, for evidently, having regard to the prior art, the claim would be abnormally wide.

Always bearing in mind that the blade alone is now under discussion, we are of opinion that neither could the patentee have claimed the invention of a blade presenting generally the characteristics of a central non-circular opening with spaced corner apertures or recesses. In that connection, many prior disclosures might have to be referred to, including Krusius (U. S. 885252), Wakely (U. S. 1,119,132), Vanden Berg (U. S. 1,276,712); and more particularly Société Générale de Coutellerie et Orfévrerie (Brit. 23563), where the blade described is strikingly similar to that of the appellant's specification. If claims 4 and 5 were meant to cover all central non-circular openings with spaced corner apertures in a razor blade, the question how far they are anticipated by these patents would have to be developed.

But the appellant argues the openings in the blade he claims as new are openings with certain functions in the holder and the openings in the earlier blades were not intended to function in the same way as the openings described in the claims in suit. A claim for a blade having openings with certain functions in the holder comes perilously near being a claim for the combination and not a claim for the so-called subordinate invention, for, in such

a case, the utility of the holes depends entirely upon their co-operation with the projections in the other members of the razor. In any event, the moment the validity of the subordinate invention is put on that ground, it necessarily limits the form of the holes in the blade to that of holes shaped in the particular way required to function in the holder and that is to say: to holes precisely as described in the specification for the purpose of functioning in the precise holder therein described.

The appellant's patent does not disclose a pioneer invention. It has to do with a certain mechanical improvement in a well-known class of safety razors. Even if there be valid subject-matter of a patent in the blade alone—and our present view would be that there is not—the subject-matter lies in the particular mechanical mode by which the alleged invention is carried into operation (*Tweedale* v. *Ashworth*, 9 R. P. C. 126). And the words of *Lord Watson* in that case are very pertinent (p. 128):

> "The plain object of the invention as described in "the specification is to substitute better mechanical "equivalents for those already known and used as a "means to the same end. It follows that, in construing "the appellants' specification, the doctrine of mechan- "ical equivalents must be left out of view. He cannot "bring within the scope of his invention any mechani- "cal equivalent which he has not specifically described "and claimed."

Similar observations were made in *Curtis* v. *Platt* (3 Ch. D. 135 and 11 L. T. n. s. 247) and in the judgment of Lord Davey in *Consolidated Car Heating Co.* v. *Came* (1903 A. C. 516-518).

If the above principles be applied to claims 4 and 5, the appellant is driven to the alternative that: either the claims are to be construed as limited to the precise mechan-

ism described in the specification and shown in the drawings or else they have been designed in order that they might be expanded or contracted as occasion might require in the interest of the patentee and, if that be so, they are bad and void. (See LORD LOREBURN'S speech in the House of Lords in *Natural Colour Kinematograph Co.* v. *Bioschemes, Ld.*, 32 R. P. C. 256, at p. 266; and also that of the LORD CHANCELLOR in *British Ore Concentration Syndicate* v. *Minerals Separation, Ld.*, 27 R. P. C. 33, at p. 46.)

The blade disclosed in the claims in suit is a blade having a non-circular or angularly shaped opening disposed substantially centrally. The specification refers to and the drawings show a diamond shaped opening in the center—both latitudinally and longitudinally—of the blade. The drawings "form an essential part" of the patent (Patent Act, subs. 4 of s. 14) and they are useful to indicate the invention "as contemplated by the inventor" (s. 14a). It was represented that they are only subsidiary to the verbal description. In this case, they agree with it and, besides, reading claims 4 and 5 with the body of the specification and with the drawings is giving them a beneficial construction, as otherwise they would lack the distinctness and the precision required in the premises.

Further proceeding in the disclosure, we find that the function of the central opening is to cooperate with a projection of a similar shape in the guard, adapted snugly, "so that the blade will * * * be retained * * * in shaving relation to the guard teeth when the parts are assembled."

According to the evidence, no razor or blade was ever built by the appellant in accordance with the above description. The patent issued in May, 1926. In November, 1929 a safety razor—known as the bar type razor—which might or might not come under the patent—went into production and was put on sale by the appellant in the early part of 1930, but the manufacture of that article was soon abandoned; and, then, another safety razor, known as the Good-

will type, claimed to be made under the patent by the appellant, came on the market in May or June, 1931. We are not called upon to decide whether the Goodwill razor corresponds to the patent. We are concerned only with the blade disclosed in the claims in suit and the question is whether that blade was patentable, whether it was adequately claimed and whether it was infringed.

The blade manufactured and sold by the respondent differs from that disclosed in the patent in that, instead of a diamond shaped opening disposed in the center latitudinally and longitudinally of the blade, it has a long irregularly shaped slot extending for most of its length and that, instead of the notches in the ends, the four corners are perforated with rectangular openings. The central hole in the blade is not adapted to fit snugly over a projection in the guard. In fact, if one takes the whole, opening as being a hole—which it is not within the meaning of the patent—that opening is not disposed centrally in the blade, in the sense that, as just mentioned, it extends practically over the whole length of the blade. Assuming the respondent's blade was used in the Goodwill holder, far from fitting snugly over the projections of the Goodwill guard, there would be no function whatever in the longitudinal slot, nor in the central hole of the respondent's blade. The means co-operating with the guard of the holder and retaining the blade in shaving relation thereto would then consist in two enlargements, diamond shaped, of the longitudinal slot; and, for that purpose, the rest of the slot and the central hole would be functionless. If one suppressed all the parts of the elongated slot thus being functionless, the blade would remain with the central hole (which has nothing to do with shaving relation) and two diamond shaped apertures spaced from the central hole; or altogether: three openings. The blade as designed by the respondent may fit the razor patented by the appellant, although it would not fulfil the functions intended in claims

4 and 5—or, at least not in the same way—but it will also fit the bar type razor, the Goodwill razor and other holders, according to the evidence.

The respondent's blade does not correspond to the blade described in the specification and in the drawings. There was no infringement. Of course, the appellant urges the respondent's blade is substantially similar to the blade used in the Goodwill type of razors. The answer is that the Goodwill blade is not the article disclosed in the patent.

We have been referred to a judgment rendered in United States and reported in 60 Federal Reporter (second series), at page 1019, wherein the corresponding United States patent was involved. In that case, the combination claims were sued on. Besides, it is quite apparent from the report that the evidence, the prior art referred to and, in certain aspects, the law to be applied were not the same. The whole trial was conducted on a different footing. We mention the judgment to show that it was not overlooked.

The appeal should be dismissed with costs.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

No. 272

GILLETTE SAFETY RAZOR COMPANY,
Petitioner,

v.

HAWLEY HARDWARE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
AND
BRIEF IN SUPPORT OF SAME.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

No.

GILLETTE SAFETY RAZOR COMPANY, PETITIONER,

v.

HAWLEY HARDWARE COMPANY, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Gillette Safety Razor Company, respectfully prays for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review a judgment of that Court entered April 27, 1933, being the date of the order denying the petition for rehearing (Rec. p. 638).

The transcript of the record in the case, including the proceedings in the said Court of Appeals, is furnished herewith in accordance with Rule 38 of the Rules of this Court.

SHORT AND SUMMARY STATEMENT OF THE MATTER INVOLVED.

This case is one of three cases each of which raises the same question of law. The other cases are *Gillette* v. *Standard Safety Razor Company* No. 338 * and No. 230 †. Petitions for Writs of Certiorari are filed in each of the three cases.

This action was a suit in the District Court of the United States for the District of Connecticut to enjoin infringement of

* Docket number of the Circuit Court of Appeals.

† Docket number of this Court.

certain claims of two letters patent for inventions in safety razors, viz.,

(1) Thompson No. 1,815,745, claims 1, 2, 4, 5, 7 and 8.
(2) Gaisman No. 1,633,739, claims 1 and 3.

All of said claims of the Thompson patent, and claim 3 of the Gaisman patent cover novel features of the blade in combination with the novel razor frame which is correspondingly constructed. Claim 1 of the Gaisman patent relates solely to the novel blade shown and described in the Gaisman patent.

Contributory infringement of claims 1, 2, 4, 5, 7 and 8 of the Thompson patent and of claim 3 of the Gaisman patent is charged. These claims cover the combination of the frame and blade. The contributory infringement charged is the manufacture and sale to the general public of duplicate blades with the knowledge and intent that they will be used to replace original blades before the latter are worn out.

Direct infringement of claim 1 of the Gaisman patent is charged. The infringement of this claim consisted in the sale of blades embodying the invention covered by the claim.

The District Court (Hon. Edwin C. Thomas) held the claims to be valid and infringed.

On appeal the Circuit Court of Appeals (opinion by Judge Manton) did not disturb the conclusion of the District Court as to the validity of the patents in suit, but decided as to the combination claims of both patents (claims 1, 2, 4, 5, 7 and 8 of Thompson and claim 3 of Gaisman) that the sale of duplicate blades to the public at large did not constitute an act of contributory infringement, and, as to the Gaisman patent, that defendant's blade did "not infringe the construction or perform the functions specified in claim 1 and claim 3". In its opinion the Circuit Court of Appeals discussed the infringement of the Gaisman patent, but did not discuss the question of contributory infringement, saying that the reasons for its conclusion were "stated in *Gillette* v. *Standard Safety Razor Co.* decided this day". The opinion in *Gillette* v. *Standard Safety Razor Company*, No. 230, is therefore to be considered as the opinion in the instant case as far as the question of contributory infringement is concerned.

AS TO CONTRIBUTORY INFRINGEMENT OF THE COMBINATION CLAIMS OF THE THOMPSON AND THE GAISMAN PATENTS.

This question is identical with that raised in *Gillette Safety Razor Company, Petitioner*, v. *Standard Safety Razor Corporation*, No. 230, docketed July 3, 1933, and the facts, as far as this petition is concerned, are likewise identical except in minor details. The reasons for granting the petition are the same and, therefore, are not repeated here. It is respectfully requested that this Court refer to that petition and brief.

This petition and the appended brief deal solely with the question of infringement of the Gaisman patent No. 1,633,739.

AS TO INFRINGEMENT OF THE GAISMAN PATENT NO. 1,633,739, CLAIMS 1 AND 3.

Gaisman's invention consisted in employing the blade to fix the cap or clamping member in proper shaving relation to the blade and to the guard instead of providing pins on the cap which passed through holes in the blade into holes in the guard. This change in construction reduced the objectionable effect of errors in manufacture at least a third.

Claim 1 for the blade itself is as follows:

> "A blade having a non-circular opening substantially centrally disposed to retain the blade in shaving relation to a guard member, said blade having means spaced from said opening to co-operate with a clamping member to retain the latter in shaving relation to the blade independent of the guard member."

Defendant's blade has two (instead of one) diamond-shaped openings which are spaced equidistantly from the center, and four notches in the *corners* of the blade instead of four notches in *ends* of the blade as in the blade of the Gaisman patent. The blade is the sole means by which the cap is held in shaving relation (*i. e.*, positioned) on the guard, and therefore co-operates with the clamping member to retain it " in shaving relation to the blade independent of the guard member". The claim is

clearly infringed since the defendant's blades have the several elements described in the claims or their equivalents, and these elements perform the same functions in the same way as the corresponding elements of the patent in suit. The changes are mere colorable evasions producing no difference in mode of operation or results.

Notwithstanding these facts, the Court of Appeals for the Second Circuit held the claims not infringed. It came to three wrong conclusions:

(1) Defendant's blade is constructed to act as the connecting link between the cap and guard and positions the parts with relation to each other. It has the same construction and mode of operation as the blade covered by claim 1. The Circuit Court of Appeals should therefore have held that claim 1 was infringed by defendant's blade.

(2) The Court held that defendant's blade did not have a "non-circular opening substantially centrally disposed to retain the blade in shaving relation to a guard member". Obviously this was flagrant error. Had Judge Manton, who wrote the opinion, understood the case, such error would have been impossible. The diamond-shaped portions of the slot in defendant's blade fit on the two lugs on the guard member, thus retaining the blade in shaving relation, and this part of the slot is centrally disposed, *i. e.*, is symmetrically arranged with respect to both axes of the blade.

(3) The Court held that defendant's blade did not have "means spaced from said opening to cooperate with a clamping member (cap) to retain the latter in shaving relation to the blade independent of the guard member". This conclusion was equally erroneous. The most casual consideration at once discloses that the corner notches in defendant's blade are spaced apart from the central opening and cooperate with the lugs on the cap. The opening and the lugs are the only means which position the cap, *i. e.*, retain it in shaving relation to the blade. They accomplish this result entirely independently of the guard.

When in place in the plaintiff's razors, defendant's blade performs exactly the same function and accomplishes exactly the same results as the blade of the Gaisman invention. Defendant's blade is slightly different in form but in substance is the same as plaintiff's patented construction. The differences are merely colorable. They cannot be allowed to nullify plaintiff's patent. Judge Manton's decision flies in the face of the long line of decisions of this Court relating to obvious equivalents.

Also, it is to be observed that *defendant has never attacked the merit of the invention.*

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Your petitioner respectfully prays that the Writ be allowed for the following reasons:

As to the question of contributory infringement of both the Thompson and the Gaisman patents.

For the reasons fully set forth in the petition and brief in *Gillette Safety Razor Company, Petitioner* v. *Standard Safety Razor Corporation*, No. 230, already referred to.

And also as the Gaisman patent in suit.

Because the Court of Appeals for the Second Circuit was obviously wrong in holding that defendant's blade does not infringe claims 1 and 3 of the Gaisman patent.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 303, *Gillette Safety Razor Company, Appellant*, v. *Hawley Hardware Company, Appellee*, and that the said decree of the Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, and that your petitioners may have

such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

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by GEORGE P. DIKE,
CHARLES NEAVE,
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